



February 23, 2018

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
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Washington, DC 20460  
(202) 566-166

Regional Freedom of Information Officer  
U.S. EPA, Region 10  
Office of Ecosystems, Tribal and Public Affairs  
1200 6th Avenue ETPA-124  
Seattle, WA 98101  
(206) 553-8665

And any other Office Where Records Requested May Be Housed

**RE: Freedom of Information Act Request, Documents Regarding  
Authorization to Discharge Under Idaho/National Pollutant Discharge  
Elimination System – Dry Creek Ranch**

Dear EPA FOIA Officer,

Pursuant to the Freedom of Information Act, 5 U.S.C. Sec. 552-et seq., WildLands Defense (WLD) hereby requests that you send the following documents, all of which are matters of public record and should be easily available to you.

The requested records concern all information, documents, and instruments related to any previous or current inquiries and/or previous, current, or anticipated permits, applications, and/or authorizations to discharge under the Idaho and/or national pollutant discharge elimination system (NPDES) into the Receiving Water Body: Dry Creek, in Ada County, State of Idaho (~ AU ID17050114SW013).

The requested documents include e-mails/text messages, letters, reports, meeting records, memoranda, phone logs, public or agency or other comments, letters, all relevant water quality certification documents, IDEQ documents, correspondences with any prospective or current applicant/permittee or agent, and scientific data and analyses related to the above-requested information.

Time period: 2007 to the present.

If you believe that any portions of the documents requested are exempt from disclosure under FOIA, you are required by the Act to segregate those portions and provide the rest of the information.

If you wish to withhold any documents referred to in this request, please send us an administrative Vaughn Index pursuant to U.S.C. Sec 552 (b) and Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. Denied 415 U.S. 977 (1974). This index should specify the following information about each document withheld:

- The title, author, date of each document withheld.
- A description of each document withheld, including the subject and conclusion of the document.
- A legal citation to the exemption for each document withheld and an explanation of how the exemption applies to each document.
- A list of all documents, including memos, electronic mail, and other communications which are referenced in the withheld document, or are referenced by the withheld document.

This letter describes how and why WLD meets the two factors entitling WLD to a fee waiver under the Freedom of Information Act. See 5 U.S.C. § 552(a)(4)(A)(iii). See also 43 C.F.R. Part 2, Appendix D.

Under the fee waiver provisions as enacted by Congress, a requester qualifies for a fee waiver if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). Through FOIA regulations, the Department of Interior has articulated the following four-part test to determine if a requestor meets the statutory requirements for a fee waiver that is relevant here: (1) Do the records concern the operations or activities of the government?; (2) If so, will disclosure likely contribute to public understanding of these operations and activities?; (3) If so, will release of the requested information contribute significantly to public understanding?; and (4) Is disclosure primarily in the requestor’s commercial interest? See 43 C.F.R. Part 2, Appendix D.

WLD meets the test articulated in the Department of the regulations implementing FOIA, and, therefore, EPA must waive the fees associated this FOIA request.

**Factor 1: Do the requested records concern “the operations or activities of the government”?**

Yes. Our request is for documents relating to the EPA’s records, oversight, data, communications, tracking, analysis, use of science, management, consultation,

investigations related to Dry Creek, that would provide the requesting party with timely information on EPA and Idaho's water quality protection process.

**Factor 2: If so, will disclosure likely contribute to public understanding of these operations and activities?**

Yes. WLD is an Idaho non-profit membership organization (501c3) dedicated to protecting wildlife and wild land ecosystems. WLD works to empower informed activism on lands in the West including Idaho. We work to engage agencies through participation in public processes, documenting conditions, and educating and informing the public of management of federal public lands, predator and prey habitats, as well as habitat conditions for endangered, threatened, and sensitive species, and protections for watersheds, waters, native biota wild lands, and other important values. WLD's Board and members are active in seeking to protect and improve ecosystems and habitats, as well as seeking to foster public appreciation of wild lands and native biota, and communicating those values to the public and decisionmakers. To do so, WLD seeks to actively engage in media outreach and natural resource agency proceedings concerning the EPA and other agency management of activities or pollution that may impact ecological processes, habitat conditions for native aquatic and terrestrial biota, natural resources, important native species, and the adverse impacts of human disturbance of public lands, waters and habitats for native biota. WLD actively visits public and other lands in the western U. S. to observe aquatic species and wildlife in their native habitats. Moreover, in the case of the injection wells, not only may native aquatic species and other biota suffer altered and disrupted water regimes and pollution, Many WLD members live in Idaho, and would suffer the consequences of pollution and ecological damage from lax injection well activities and oversight.

All of the records requested in this FOIA are essential to WLD's mission to educate its members and the general public, and to enable and empower them to advocate for protection of our public wild land ecosystems, waters, watersheds and the native biota inhabiting the American West and Idaho. See:

<http://wildlandsdefense.org/about/> .

The informative value of the records requested is that this information enables WLD to inform and educate the public and empower informed citizen involvement and engagement, and also to explain the hurdles citizens may face, when seeking to understand how federal agencies conduct their operations and fulfill their regulatory and oversight roles - which greatly impact the wild land ecosystems and native biota across Idaho.

WLD intends to increase public awareness of EPA's activity and oversight of these effects on the interconnected web of life necessary to support healthy and thriving native ecological communities through: (1) collecting documents from EPA addressing its regulatory actions, NEPA review, consultation, public comment, and other oversight for

water quality permitting processes; their effects on the natural world and the human environment; how the agency conducts and implements actions for which it has legal authority; and the agency's management, monitoring actions and reliance on scientific methods and regulatory controls, (2) employing the analytical abilities of WLDs members, Board and colleagues, trained in the fields of biology and ecology, botany, natural history as well as other scientific disciplines, and who also rely on public and other lands and waters in native ecosystems for their recreational, aesthetic and spiritual interests, and to conduct an independent analysis and assessment of EPA's actions in water quality oversight, potential pollution tracking, public concerns, oversight and regulatory activity, and (3) disseminating this analysis and assessment through public education and outreach activities which may include presentations at local, regional or national conferences, engaging with national, regional and local media outlets, posting the information on our website and/or facebook page which has thousands of followers, , participation in administrative processes, litigation or other enforcement of federal environmental laws.

Specifically, the requested information will contribute to the public understanding of EPA's oversight and activities across Idaho and other lands and EPA's tracking and oversight and public concerns over the impacts of pollution discharge in bodies of water adjacent to Idaho's largest city. It will enable WLD and WLD's members to engage in knowledgeable participation in management processes related to conservation and the effects of potential well pollution and other activities. There is no other way to obtain information on how EPA engages in and oversees actions, processes, projects, and incidents associated with such pollution and also to understand their effects on rare and important species except through these documents, which are supposed to be public documents, available to the public for comment, reference, education and media dissemination.

These documents help educate the public about what the EPA is doing to ensure the CWA and other regulations are followed and their provisions are upheld, as well as understanding the implementation and effectiveness of environmental protections and conservation promises made by agencies for the human environment. This information will be used to inform public involvement in local, state and federal processes through which citizens gain knowledge about, and ability to, protect waters and threatened, endangered and other species that rely on them, and otherwise protect and restore the natural resources of Idaho. There is substantial public interest in EPA's authorization and oversight of polluting or water-impacting activities, and in the quality of the data and science that EPA uses to undergird its oversight, data collection, tracking, management, regulatory and enforcement findings, decisions and activities. The public interest to be served by disclosure of these documents is, therefore, informing and educating the public about EPA activities in this vein.

Furthermore, federal agency activities, monitoring/tracking of adverse impacts to aquatic species and other biota, and the human environment, regulatory enforcement and

decisionmaking are supposed to be public processes in which information is supposed to be readily available to the public at large. Unfortunately, in many instances such documents as the ones requested here are long, tedious to read, and difficult to understand. Also, in many instances, they are not provided to the general public.

Accordingly, it is groups such as the WLD that compile this information into a more readily understandable form for the general public, as well as for our members. We shine light on opaque and often complex processes. WLD's Board and members have amassed expertise and knowledge in examining and analyzing similar documents, and reaching tenable, scientific observations and conclusions on the effectiveness of EPA's oversight and management of polluting activities that may impact watersheds, waters, native biota, the health of Idaho citizens, and the political pressures and biases that may be affecting agency actions. Specifically, WLD includes scientists with expertise in native vegetation ecology, public outreach and political science that includes inter-facing with media on matters of ecology and biology, natural history, and political controversy over wildlife conservation activity. Furthermore, WLD's volunteers, members and board have considerable experience examining and assessing documents and information similar to the information sought.

As previously stated, WLD intends to undertake public dissemination designed to distribute the results of our analysis and assessment of the requested agency documents.

This information dissemination, assessment and analysis will be undertaken through the following means: These may include: our Website at [www.wildlandsdefense.org](http://www.wildlandsdefense.org); wildlands defense facebook page: <https://www.facebook.com/wildlandsdefense/>, other on-line and electronic media forums; providing the information to activists who seek knowledge on how to effectively participate in and engage EPA and other agencies in public processes and advocate for wild lands protection; and through dissemination to the media.

By way of example only, WLD is disseminating analysis and assessment of agency management of federal public lands and their ecological values through the following outreach avenues: Presenting information at civic clubs, universities, community events and upcoming environmental conferences and other forums; disclosure to media outlets; dissemination through on-line postings; posting the information on its website or other Internet outlets. WLD may disseminate its analysis and evaluation to the public through every avenue discussed previously.

With respect to WLD's ability to disseminate the information to the public, WLD does so in a variety of ways, including: communicating with local, regional and national press outlets; presentations to the general public; networking with members of other conservation organizations; and participation in public events.

Increasingly, Internet information provides a primary means of communication and information gathering. For example, WLD's on-line posting of activities, news and media has garnered considerable internet interest and inquiry.

**Factor 3: If so, will release of the requested information contribute significantly to public understanding.**

Yes. Release of the information will contribute significantly to public understanding of EPA's role in ensuring on-the-ground protections for ecosystems, animals and the public, and the manner and effectiveness of EPA's regulation, oversight and management.

The information being sought, on EPA regulation, oversight, EPA processes, consultation, monitoring, investigations, scientific studies and risk analyses, and other actions and impacts and effects of discharge permits and potential contamination and/or depletion of waters.

As such, this information is new, and has not been previously distributed to WLD or the public. In fact, organizations such as WLD provide the primary means by which the public at large is apprised of, and has access to, this information. Furthermore, because the information that is sought allows the public to gain knowledge and data on EPA oversight to inform participation in agency processes, it would also clarify pre-existing information, including EPA and other federal and state agency compliance with regulations and claims made to the public, as well as potentially federal regulations regarding management and regulatory protection in Idaho.

As one of the only organizations specifically dedicated to the preservation and protection of the wild lands and native biota including aquatic biota threatened by injection wells, and empowering activist education and information in support of these values, WLD is a very important hub of information for both its members and the public who have an interest in the health and management of our public and other western lands and animal habitats and populations.

As discussed above, disclosure of the requested documents will contribute significantly to the public understanding of government operations and activities relating to injection well and environmental protection oversight.

WLD provides a way for the public to better understand EPA processes, management, oversight, commitment to regulatory protections and other matters affecting water quality. The release of these documents and their dissemination to the public through public events, web sites, the media, and other avenues will increase the knowledge of the public on natural resource protection throughout Idaho, a very important and unique ecological place, where federal regulatory protections and management often face strong political pressures.

#### **Factor 4: Is disclosure primarily in WLD's commercial interest?**

A commercial interest is one that furthers a commercial trade, or profit interest. WLD has no commercial interest in obtaining this information and requested fee waiver. Rather, WLD, a not-for-profit group that strives to protect the natural resources of Idaho, and informs the public about federal agency oversight related to animal species. Nowhere in WLD's mission statement, by-laws, charter, or other information does the organization state a profit motive goal.

#### **Additional Information Concerning Fee Waiver: Legal Background.**

In 1986, Congress amended the judicial review section for fee waivers under FOIA, replacing the "arbitrary and capricious" threshold of review, by which courts are required to grant deference to agencies, with the more rigorous de novo review standard. 5 U.S.C. § 552(a)(4)(A)(vii). The reason for this change is that Congress was concerned that agencies were using search and copying costs to prevent critical monitoring of their activities:

Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information, which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information ....

132 Cong. Rec. S14298 (Sen. Leahy).

FOIA's amended fee waiver provision was intended specifically to facilitate access to agency records by citizen "watchdog" organizations, which utilize FOIA to monitor and mount challenges to governmental activities. See Better Government Association v. Department of State, 708 F.2d 86, 88-89 (D.C. Cir. 1986).

Fee waivers are essential to such groups, which rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions ...

The fee waiver provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups.

Id. at 93-94 (emphasis added).

Thus, one of the main goals of FOIA is to promote the active oversight roles of watchdog public advocacy groups, organizations that actively monitor or challenge agency actions and policies.

Public-interest fee waivers are to be "liberally construed in favor of waivers for noncommercial requesters." McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987). "[T]he presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public." Ettlinger v. FBI, 596 F.Supp. 867, 873 (D. Mass. 1984) (quoting legislative history). An agency may not refuse a fee waiver when "there is nothing in the agency's refusal of a fee waiver which indicates that furnishing the information requested cannot be considered as primarily benefiting the general public." Id. at 874, quoting Fitzgibbon v. Central Intelligence Agency, Civil No. 76-700 (D.D.C. Jan. 10, 1977). "Once the FOIA requester has made a sufficiently strong showing of meeting the public interest test of the statute, the burden, as in any FOIA proceeding, is on the agency to justify the denial of a requested fee waiver." Id., citing 5 U.S.C. § 552(a)(4)(B).

Based on WLD's FOIA request, it is clear WLD, a non-profit group interested in oversight of federal agency management and oversight of pollution or depletion of waters, and public processes and consultation over this, affects the environment and species habitats and populations. This will foster public access to information on EPA activities, and aid in disseminating information on this issue to its members, members of other local, state, regional and national conservation organizations, the public, and the media, is entitled to a fee waiver for the specific documents requested.

Accordingly, WLD asserts that a fee waiver is proper as it complies with the fee waiver requirements of FOIA, see 5 U.S.C. § 552. If the EPA should deny our fee waiver, please notify us immediately of the costs for these documents so we can proceed from there. Thank you in advance for your prompt reply. Please feel free to contact me if you need any clarification of any of the above information.

Sincerely,



A handwritten signature in black ink, appearing to read "Katie Fite". The signature is written in a cursive, flowing style with some loops and a long horizontal stroke at the end.

Katie Fite  
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